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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ARMAND VILLASANA, JR.,

Petitioner,

versus

WELDON WILHOIT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE LAW ENFORCEMENT AGENTS OF THE MISSOURI STATE HIGHWAY PATROL WORKING IN THE PATROL'S CRIME LABORATORY ARE ENTITLED TO QUALIFIED IMMUNITY FROM LIABILITY UNDER 42 U.S.C. §1983 BECAUSE THEY DID NOT HAVE A "CLEARLY ESTABLISHED DUTY" UNDER THE LAW OF THE STATE OF MISSOURI AND THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS PRIOR TO 1998 TO MAKE ACCURATE AND COMPLETE DISCLOSURE TO THE PROSECUTOR AND THE DEFENSE OF THE RESULTS OF SCIENTIFIC TESTING THAT COULD POTENTIALLY IDENTIFY THE PERPETRATOR OF A VIOLENT CRIME?

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PETITION FOR A WRIT OF CERTIORARI

Armand Villasana respectfully petitions this Court to review the decision of the United States Court of Appeals for the Eighth Circuit.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The opinion of the United States Court of Appeals for the Eighth Circuit is published at *Villasana v. Wilhoit*, 368 F.3d 976 (8th Cir. 2004), and is reprinted here as Appendix A.

JURISDICTION

The Eighth Circuit Court of Appeals rendered its opinion on June 1, 2004. *See* Appendix A. On October 14, 2004, this Court granted a sixty day extension of time to file the petition for writ of certiorari, making this petition due on or before December 27, 2004. *See* Appendix C. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. §1983, which provides, in pertinent part:

§1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

This case also involves the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . . U.S. CONST. amend. XIV.

This case also involves Missouri Supreme Court Rule 25.03 which provides in relevant part:

> **25.03. Misdemeanors or Felonies – Disclosure by State to Defendant Without Court Order**
>
> **(A)** Except as otherwise provided in these Rules . . . the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in said request:
>
> * * *
>
> (5) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;
>
> * * *

(9) Any material or information within the control of the state, or its agents, which tends to negate the guilt of the defendant as charged, negate the degree of the offense charged or reduce punishment.

STATEMENT OF THE CASE

A. In Summary

Petitioner seeks certiorari to review the judgment of the Eighth Circuit Court of Appeals affirming the grant of summary judgment to the defendants by the U.S. District Court for the Western District of Missouri.

This case arises from the wrongful conviction and imprisonment of Armand Villasana for the crime of rape. Post-conviction DNA testing established Mr. Villasana's actual innocence. No DNA comparison testing was done prior to trial because the Missouri Highway Patrol Crime Laboratory, staffed by police officers, alternately reported and/or testified that there was "no semen detected," "no semen present," and "nothing available for DNA testing" in the rape kit and clothing obtained from the victim. These statements, made in reports released during discovery, and made under oath in depositions were misleading and false. The truth was kept hidden from counsel for defendant and from the prosecutor by an official policy of concealment calculated to frustrate attempts by defendants to obtain reliable test data. The policy, approved at the highest levels within the Missouri Highway Patrol, was promulgated with reckless disregard for the constitutional rights of defendants to obtain material evidence of exculpatory value. Petitioner seeks relief against the Missouri State Highway Patrol commanding officer and

crime lab employees. Summary judgment was granted by the district court for defendant on the theory that the defendants were entitled to qualified immunity because, whether or not the information withheld from the defense was so-called "*Brady* material," no previous case had extended Section 1983 liability to crime lab technicians. The Eighth Circuit affirmed, and stated as an additional reason for the grant of summary judgment that no *Brady* violation occurred because the material withheld was not truly exculpatory and because defense counsel had an opportunity to obtain the information in other ways.

B. In Detail

On September 16, 1998, a woman was kidnapped, raped, and sodomized in Greene County, Missouri. She submitted to a rape kit examination at a local hospital, and the examining physician collected items of physical evidence.

Nine days after the rape, on September 25, 1998, Plaintiff Armand Villasana was arrested on an outstanding warrant for an unrelated charge. After his arrest, Villasana was told that he was being investigated in connection with the rape because he resembled a composite drawing of the attacker.

Villasana maintained his innocence, denying any involvement in, or knowledge of, the rape. He cooperated fully with detectives. He waived his Miranda rights, agreed to be photographed, consented to a blood test, and allowed detectives to search the motel room in which he was living.

On the night of Villasana's arrest, a deputy asked the victim to come to the Sheriff's Department. He told her that a "suspect had been arrested that appeared similar to the suspect in the composite drawing." When he showed her a Polaroid photograph of Villasana, she said that he looked similar to the rapist, but she could not positively identify him. She said that the best way for her to identify the rapist would be to hear his voice.

The deputy took her to an office in the jail. The door to an adjoining office was opened about 3 inches, and she sat in a chair by the door. Jailers then brought Villasana into the adjoining office and sat him on the opposite side of the door, and a medical technician questioned him while the victim listened to his voice. She identified Villasana's voice as that of the rapist, but she was never asked to compare Villasana's voice to that of any other person.

No physical evidence linking Villasana to the rape was ever discovered.

Villasana was charged with kidnapping, rape, and sodomy on September 26, 1998. Unable to make bail of $550,000.00, he was held in the Greene County Jail until his post-conviction release on June 21, 2000.

At all times pertinent to this case, Respondents Capt. Terry Luikart, Lt. John Ford, Cary Maloney, Thomas Grant, and Joseph Roberts were employed by the Crime Laboratory Division, which is a branch of the Missouri State Highway Patrol. This lab is physically a part of the Patrol campus in Jefferson City, Missouri.

Weldon Wilhoit, as Colonel and Superintendent of the Patrol, had the ultimate authority over the Crime Lab

Division in 1998 and 1999, including implementing constitutional procedures that applied to the Patrol.

Joseph Roberts was a criminalist in the lab's DNA/Serology Section from 1998 through June, 2000. A "criminalist" in the DNA/Serology Section examines items of evidence for the presence of bodily fluids, and reports his conclusions to the submitting agency. A criminalist thus is essentially "an investigator of forensic-type evidence." Roberts was one of the criminalists who, at the request of the Greene County Sheriff's Department and the prosecutor, tested and analyzed evidence in connection with the rape charges against Villasana. During the hearing on Villasana's new trial motion, the prosecutor referred to Roberts as "the State's own DNA expert." The State read Roberts' deposition into evidence at Villasana's trial in November, 1999.

The Patrol Crime Lab is available for only governmental agencies to use. A criminal defendant or his counsel cannot hire it. It does not charge law enforcement agencies fees for its services.

Despite the fact that they are agents of the State and are specifically employed by the Missouri State Highway Patrol for forensic work in criminal cases, Maloney, Grant, and Roberts said that they never received any training on the constitutional rights of criminal defendants and, more specifically, the obligation to disclose information favorable to the accused pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

The Crime Lab's official policy provides that ***only typewritten forensic laboratory reports containing "conclusions drawn from laboratory results"*** are to be sent to prosecutors voluntarily. Any other documents

containing handwritten test results or statements of criminalists may be produced only upon a specific request for them.

None of the crime lab Defendants could say who originally drafted this policy. They agree, however, that Luikart reviewed and approved it and that the ultimate authority for written lab procedures Colonel Wilhoit. Grant, who at the time was in charge of training lab employees about pretrial disclosures and production of case file materials, said that this policy served as the basis for that training.

On January 31, 1999, Public Defender Wilson filed a discovery request pursuant to Missouri Rule of Criminal Procedure 25.03 in which he specifically sought the following:

> 5. Any reports of [sic] statements of experts made in connection with this case, including the results of any type of physical, mental or scientific testing conducted regarding this case or the defendant and all underlying notes of such experts;
>
> * * *
>
> 9. Any material or information within the control of the state, or its agents, which tends to negate the guilt of the defendant as charged, negate the degree of the offense charged or reduce punishment.

The prosecutor neither objected to these discovery requests nor sought a protective order. She did not send them to the Patrol Crime Lab. The Greene County prosecutor's office has an "open file" policy: After a preliminary hearing, defense counsel may see everything in the prosecutor's file, including documents that the prosecutor has

obtained from the Patrol Crime Lab. Villasana's public defender relied on this "open file" policy in connection with his discovery in Villasana's case. After obtaining paper discovery, he deposed Roberts on September 30, 1999.

On October 6, 1998, the Missouri State Highway Patrol Crime Laboratory received a blood sample from Villasana and various items of physical evidence collected during the victim's hospital examination. From his testing of these, the only documents that Roberts disclosed to the prosecutor for production before his deposition and Villasana's trial were five typewritten reports entitled "Forensic Laboratory Reports." In keeping with official policy and Roberts' training, these reports contained only Roberts' ultimate conclusions, such as "semen was not detected." They did not describe the type of tests Roberts conducted, report the ***results*** of those tests, or disclose other ***statements*** that Roberts recorded during his testing.

Villasana's trial began on November 8, 1999. He was convicted by a jury of kidnapping, forcible rape, and forcible sodomy on November 10, 1999. The jury recommended a sentence of 70 years in prison.

After his conviction, Villasana borrowed money from a family member and hired new private attorneys in order to seek post-conviction relief. On February 24, 2000, those attorneys learned that Roberts had not, before trial, disclosed to the prosecutor documents containing underlying scientific test results and statements.

The suppression surfaced when Villasana's attorneys received a fax from the prosecutor conveying testing documents and Roberts' cover page explaining his notations about the various test results. (A-28-31) Villasana's attorneys had asked the state court for more time to perform

alternate light source and other testing on the clothing that Roberts had tested. The prosecutor responded to the request by saying that the requested testing had been performed, as evidenced by Roberts' fax bearing the previously suppressed information.

Eventually, in April 2000, after seeking an order to compel production, Villasana's attorneys received about 20 pages of documents never before disclosed to either the prosecutor or Public Defender Wilson. Two of those documents – the "Victim Sexual Assault Kit" and "Blood and Semen Detection" forms – are central to this case. (A-30-31)

Those documents show, among other things, that the victim's vaginal swabs tested positive for acid phosphatase ("AP"), an enzyme found in high concentrations of seminal fluid, and that a portion of one swab was retained for possible DNA testing. They also show that stains on the victim's sweat pants and on the hospital sheet upon which she was examined fluoresced under the alternate light source test, indicating the possible presence of biological material for testing. (A-31)

Maloney and Roberts admit that the "Blood and Semen Detection" and "Victim Sexual Assault Kit" contain both Roberts' scientific test results and statements, the very information sought by Public Defender Wilson's discovery request but not produced. (A-23) It is uncontroverted that Roberts did not disclose this information due to official lab policy. Respondents further concede that even those trained in forensic science would be unable to evaluate the technical aspects of Roberts' work properly without seeing these documents.

Respondents have contended that producing copies of all case file materials in each case they investigate would

be too burdensome and costly. But they concede it would be easy enough to give those materials to prosecutors when the lab's criminalists will be deposed or when a case will be tried.

Villasana's new attorneys hired a DNA expert, Jami Harman. She tested for DNA the various items Roberts had tested and found that the victim's sweat pants bore a DNA mixture from at least two people. The victim was one; the other was neither the victim's husband nor Villasana. In addition, the DNA profile obtained from the hospital bed sheet on which the rape examination was conducted was inconsistent with that of either the victim's husband or Villasana. Finally, the vaginal swab referenced in the "Victim Sexual Assault Kit" contained a male profile consistent with the one from the sweat pants and hospital bed sheet.

On June 21, 2000, a hearing was held on Villasana's Motion for New Trial. Villasana's new attorneys argued that the State had violated *Brady* by not disclosing Roberts' test results. Both Public Defender Wilson and Harman testified in support of Villasana's motion. After hearing Harman's expert testimony and declining to cross-examine her, the prosecutor agreed that the court could vacate Villasana's conviction and grant a new trial. The State then dismissed the charges against Villasana. Villasana was released from the Greene County Jail on June 21, 2000.

At the time of Villasana's trial, Prosecutor Geary, like Public Defender Wilson, was unaware of any test result documents other than the final typewritten forensic laboratory reports. She had not dealt with forensic science in any of her prior cases, and she relied upon the Patrol

Crime Lab to give her copies of documents relating to its work on a particular case. Before Villasana's case she had never received any handwritten notes from the Patrol Crime Lab.

Roberts had no idea how the prosecutor could have known the entire contents of his file because he gave her no copies. And the Crime Lab does not educate prosecutors about the existence of test result documents. Defendants admit that the lab's reliance upon prosecutors to request documents underlying the conclusory typewritten reports presupposes that prosecutors know that there is additional information to request. That, they agree, is likewise true for defense attorneys who make discovery requests through prosecutors.

The prosecutor said that a defense lawyer would find the underlying test result documents significant, both to challenge the state's experts and to determine if further testing is necessary. She confirmed, however, that Roberts never showed them to Public Defender Wilson during his 1999 deposition in the rape case. Nor did he ever disclose their existence. After reviewing his 1999 deposition, Roberts testified that he made only one reference to his notes during that deposition and admitted there was no indication in the record that he had to physically look at his notes to give any of his answers. This use of the word "notes" from his 1999 deposition refers to the fact that a liquid in a specimen jar was "most likely urine." The word "notes" appears in two other places in the 1999 deposition transcript, but one is a reference to a date when Roberts discussed with another criminalist whether a hair was a good candidate for DNA analysis, and the other documented that the other criminalist had handed him a hair. In other words, the "notes" simply documented a chain of

custody, and none of the references to them discloses any of Roberts' test results. Public Defender Wilson did not recall that Roberts ever looked at any handwritten notes during his 1999 deposition.

It is uncontroverted that had Villasana's counsel known the underlying test results, he would have altered his trial strategy. He would have consulted a DNA expert about the need for independent testing and would have gotten help with ways to cross-examine Roberts and impeach his testimony.

REASONS FOR GRANTING THE WRIT

I. THE LAW ENFORCEMENT AGENTS OF THE MISSOURI STATE HIGHWAY PATROL WORKING IN THE PATROL'S CRIME LABORATORY ARE NOT ENTITLED TO QUALIFIED IMMUNITY FROM LIABILITY UNDER 42 U.S.C. §1983 BECAUSE THEY HAD A "CLEARLY ESTABLISHED DUTY" UNDER THE LAW OF THE STATE OF MISSOURI AND THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS TO MAKE ACCURATE AND COMPLETE DISCLOSURE TO THE PROSECUTOR AND THE DEFENSE OF THE RESULTS OF SCIENTIFIC TESTING THAT COULD POTENTIALLY IDENTIFY THE PERPETRATOR OF A VIOLENT CRIME.

The district court ruled that the defendants in this action were entitled to qualified immunity from Section 1983 liability because they did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (A-15) At the core of the

district court's ruling is the concept that, on the dates in question, there was no "clearly established right" for the prosecution and therefore the defendants to receive "*Brady* material" from lab technicians. That concept, reiterated by the Eighth Circuit, is legally unsound and contrary to the best-reasoned decisions from the federal circuits. As a result of the Eighth Circuit opinion in the instant case, there is a sharp division of authority on the *Brady* issue between the Circuits that this Court must resolve. In short, the Eighth Circuit's affirmation of the District Court opinion in this case emasculates the obligations of the prosecution toward the defense as announced by this Court in *Brady*, *Kyles*, and their progeny.

A. The decisions of this Court create a "clearly established duty" for all law enforcement officials, including laboratory personnel, to make full disclosure of potentially exculpatory material.

This Court first specifically addressed the prosecutor's duty to learn of favorable information in investigators' files in 1995 in *Kyles v. Whitley*, 514 U.S. 419 (1995), yet this duty – and investigators' corresponding duty not to withhold such evidence from prosecutors – was inherent in the reasoning of *Brady v. Maryland* itself. 514 U.S. 419 at 438. *Kyles* noted that if there were no *Brady* violation where investigators suppress evidence from prosecutors, it would "amount to a serious change of course from the *Brady* line of cases." *Id.* In other words, *Brady* would be worthless if members of the investigative team were allowed to deprive defendants of the opportunity to raise a meaningful defense by withholding favorable information from the prosecutor. *See, Hauptmann v. Wilentz*, 570 F. Supp. 351,

389 (D.N.J. 1983) ("A constitutional violation may occur when there is no *Brady* disclosure because the police have concealed exculpatory evidence from the state prosecutor. The police therefore are under a duty to disclose exculpatory information to the prosecutor.") (citation omitted), *aff'd*, 770 F.2d 1070 (3d Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).

In *U.S. v. Bagley*, 473 U.S. 667 (1985), this Court held that "[t]he constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination," although the prosecutor never knew the information existed. Likewise, in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) the defendant subpoenaed files from Pennsylvania's Child and Youth Services in a child molestation case. This Court held that the files were subject to *in camera* review for *Brady* material because they were "Government" files, even though there was "no suggestion that the Commonwealth's prosecutor was given access to the file at any point in the proceedings, or that he was aware of its contents." *Id.* at 44 n.4, 58.

Thus, the disclosure duty has always applied to the "Government" or the "State," broadly construed to include not just prosecutors, but all members of the investigative or prosecutorial team.

1. Personnel in the Missouri Highway Patrol Crime Lab are police.

The District Court opinion characterized the defendants as "lab technicians" while the Eighth Circuit referred to them as "scientists." Respondents were employed by the Crime Laboratory Division, which is a branch of the Missouri State Highway Patrol. This lab is physically a part of the Patrol campus in Jefferson City, Missouri. The Patrol Crime Lab is available for only governmental agencies to use.

Whatever their formal education and training and regardless of what their daily duties are, there can be no dispute that the Respondents are part of a law enforcement team. They are investigators and detectives. They do not just assist cops – they *are* cops. Law enforcement has evolved from detectives with magnifying glasses to detectives with electron microscopes. Law enforcement officers dust for prints, type blood, and extract and profile DNA. These are now police functions and the people who perform them are no less police-like than the detectives who canvass a crime scene on foot talking to witnesses or interrogate suspects at the station. In the year 2004, the cops with the DNA software and scientific knowledge who work in the Missouri Highway Patrol laboratory are the ones most capable of locating the evidence capable of securing a conviction or exonerating an innocent person. To the extent any other detective has a duty to disclose *Brady* material to the prosecutor, so do these laboratory detectives in the Missouri Highway Patrol.

2. Contrary to the ruling of the lower courts in this matter, numerous Circuit Courts of Appeals opinions prior to 1998 held that law enforcement personnel other than uniformed police officers were subject to *Brady* requirements.

The District Court in this case seemed unable to find any case "extending *Brady* to lab technicians" (A-16) while the Eighth Circuit refused to apply *Brady* to the non-disclosures of any member of the law enforcement team unless made intentionally or in bad faith. (A-8) The Respondent's intentions will be examined elsewhere in this Petition, but in these two positions, the Eighth Circuit stands in a distinct minority against the weight of better-reasoned opinions.

Second Circuit: *Wedra v. Thomas*, 671 F.2d 713, 717 n.2 (2d Cir. 1982) ("the knowledge of a police officer may be attributable to the prosecutor if the officer acted as an arm of the prosecution");

Fourth Circuit: *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 844, 846 (4th Cir. 1964) (nondisclosure of police ballistics and fingerprint tests violated due process even absent evidence that prosecutor knew reports existed); *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994) (investigator's nondisclosure of victim's state of mind and willingness to frame her ex-husband for a crime);

Fifth Circuit: *Geter v. Fortenberry*, 849 F.2d 1550 (5th Cir. 1988) (considering 1982 investigation, holding that "[w]e agree with Geter that a police officer cannot avail himself of a qualified immunity defense if he procures false identification by unlawful means or deliberately conceals exculpatory evidence, for such activity violates clearly established constitutional principles"); *Martinez v. Wainwright*, 621 F.2d 184, 186-87 (5th Cir.

1980) (finding *Brady* violation although state prosecutor was unaware of evidence in medical examiner's possession);

Sixth Circuit: *Hilliard v. Williams*, 516 F.2d 1344, 1350 (6th Cir. 1975) (upholding §1983 *Brady* cause of action against state police officer who "played an active role in the prosecution."), *vacated on other grounds*, 424 U.S. 961 (1976);

Seventh Circuit: *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001) ("was it clearly established in 1979 and 1980 that police could not withhold from prosecutors exculpatory information about fingerprints and the conduct of a lineup? The answer is yes: The *Brady* principle was announced in 1963, and we applied it in [the 1988 case of] *Jones* [*v. Chicago*] to affirm a hefty award of damages against officers who withheld exculpatory information in 1981.") *Id.* at 752-53.

Ninth Circuit: "[s]ince . . . investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutors, were guilty of nondisclosure." *U.S. v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978);

Tenth Circuit: *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004) ("We have no doubt that . . . an official in Ms. Gilchrist's position in 1986 [crime lab technician] had fair warning that the deliberate . . . omission of evidence was a constitutional violation");

Eleventh Circuit: *McMillian v. Johnson*, 88 F.3d 1554, 1569 (11th Cir. 1996) ("We agree with the Fifth Circuit that clearly established law in 1987 and 1988 prohibited the police from concealing exculpatory or impeachment evidence");

And perhaps, even the Eighth Circuit: *Walker v. Lockhart*, 763 F.2d 942, 958 (8th Cir. 1985) (finding *Brady* violation in State Police ballistics expert's suppression of transcript of inmate's confession although prosecutor had no knowledge of it, because "[p]olice are treated as an arm of the prosecution for *Brady* purposes.").

Decisions of the highest courts of various states specifically dealing with crime labs are in accord as well.

In re Brown, 72 Cal.Rptr.2d 698 (Cal. 1998) held that a prosecutor must inquire of the existence of Brady material in the hands of the crime lab being used in the case.

In overturning a defendant's conviction, the Massachusetts Supreme Court held:

> The question remains whether the Commonwealth, subject to a specific direction to produce evidence, may be exonerated from failing to produce State police laboratory test results because that evidence was not in the prosecution's possession (or known to it), but rather was held by the State police crime laboratory and perhaps known only to one of its chemists.[7]The prosecution had a duty to inquire concerning the existence of scientific tests, at least those conducted by the Commonwealth's own crime laboratory. That obligation is inherent in the allowance of the motion to produce all scientific test results. The prosecutor's office obviously did not conduct scientific tests. It could not satisfy the production order simply by turning over test information that it had in its files. It had a duty of inquiry.

Commonwealth v. Martin, 696 N.E.2d 904 (Mass. 1998) citing, *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 n.4, 502 N.E.2d 516 (1987) ("The Commonwealth does not

dispute that, as matter of law, the [Boston police crime] laboratory report was within its custody and control, even though no copy was ever in the prosecutor's files, and he himself was not aware that it existed. See *Commonwealth v. St. Germain*, 381 Mass. 256, 261 n.8 [408 N.E.2d 1358 (1980)]. The Commonwealth also concedes that the prosecutor was duty bound to disclose the contents of the laboratory report"). The Commonwealth should have disclosed before trial the fact and the results of the attempted confirmatory tests conducted by the State police laboratory.

3. The facts of prior cases did not have to be "on all fours" to make Respondents aware of their *Brady* obligations – prior cases gave them "fair warning."

Even though the cases cited directly above deal specifically with crime labs, the decisions of this Court make it obvious that a right can be "clearly established" even though prior cases in which the facts of prior cases discussing the issue are not perfectly matched to the case at bar. At times, rights are "clearly established" when the government official has "fair notice" or "fair warning" of the existence of the right. This Court said in *Hope v. Pelzer*, 536 U.S. 730 (2002):

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . Officials can still be on notice that their conduct violates established law even in novel factual circumstances. . . . Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusions that the law is clearly

> established, they are not necessary to such a finding. . . . The salient question . . . is whether the state of the law at the time of the conduct gave respondents fair warning that their alleged treatment of [plaintiff] was unconstitutional.

Id. at 741.

B. The evidence withheld by the Highway Patrol from the prosecutor and defense was *Brady* material.

1. In this type of case, the undisclosed evidence is material and favorable per se.

While the District Court did not suggest that reports that semen was present in the rape kit and on the clothes of the victim would not be considered exculpatory to a defendant claiming actual innocence, the Eighth Circuit felt that the "documents fell outside the scope of *Brady*'s absolute duty to disclose." (A-5)

In hindsight, it is obvious that a report showing that tests were run showing that there might be semen present in the rape kit and on the victim's clothes was material, favorable, and highly exculpatory to this particular Petitioner. Once this information was in his attorney's hands, an expert was employed, and Petitioner was well on his way to being free. The absence of such reports had a profound impact on Petitioner's lawyer's "pre-trial and trial decisions." *U.S. v. Bagley*, 473 U.S. 667 (1985). Petitioner would submit that the exculpatory quality of this evidence is not limited to his particular situation.

To a defendant who has been accused of rape, the defenses usually fall into two categories. Sometimes, the defendant admits that he and the complainant did have physical contact but his defense is that the complainant

was not raped either because that contact was consensual or did not include physical acts that meet the statutory definition of rape. More often, the defendant claims that whether or not the complainant was actually raped, he was not the person who did it. This was the position taken by Petitioner.

In the latter situations, there may be no physical evidence against the defendant at all. The identification of the defendant by the alleged victim, whether through photographs, a lineup, a "showup", or a voice exemplar, provides the proof sufficient to secure the indictment or information. To the truly innocent, the *absence* of any physical or scientific evidence that would assist in identifying the rapist is devastating. The innocent defendant *wants* there to be a rape kit full of biological evidence left behind by the rapist. The innocent defendant wants semen, active sperm, and the pubic hair of the attacker to be present in the rape kit. Without that means of identification, the innocent defendant has to rely on an alibi defense, which, if it consists of the testimony of family, friends, and co-workers (as it usually does) would be subject to ridicule by the prosecution as weak and self-serving. To a man with a "some other dude did it" defense, any evidence of semen in the rape kit is both favorable and material.

This is not just some random, routine evidence that the state is suppressing – it is the absolute core of the defense and the most persuasive and crucial evidence that could possibly be offered in a sexual assault trial. Stronger than eyewitness identification, stronger than fiber evidence, even stronger than a confession. Identification of a perpetrator through DNA profiling and comparison trumps all other forms of proof in a case of this type and every prosecutor knows it. The Greene County prosecutor

conceded a new trial and dismissed saying that there was no reasonable likelihood that she could make a case beyond a reasonable doubt if the DNA evidence was against her.

2. The Eighth Circuit misanalyzed the materiality requirement of *Brady* thus creating a split of authority between the circuits.

This Court made it clear in *Kyles*, supra: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434. Petitioner did not receive such a trial, and the Eighth Circuit is analyzing *Brady* claims without regard for the clear precedents set by this Court.

In contrast to the Eighth Circuit, courts considering the question of whether the presence or absence of semen in a rape kit is "favorable evidence rising to a material level of importance" have had little trouble deciding that it is.

In *Davis v. Pitchess*, 388 F. Supp. 105 (C.D. Cal. 1974), the court held that a defendant convicted of rape was to be discharged on due process grounds where the prosecution wrongfully suppressed laboratory reports that analyzed vaginal smear slides and destroyed the slides and an undergarment of the prosecuting witness, and where the reports and undergarment might have aided the defendant's case. The court noted that in light of the victim's testimony at trial that the assailant discharged "as he was coming out," the report's finding of the absence of sperm in

her vaginal areas or on her panties was highly relevant and material evidence going to the petitioner's guilt or innocence of the offenses charged.

Reversing a judgment convicting the defendant of the crime of taking indecent liberties with a child, in *People v. Flowers*, 281 N.E.2d 299 (Ill. 1972), the court held that the denial of discovery to the defendant, who had asked the court to order the state to disclose any evidence favorable to him and to direct the state to advise him of any tests that were made to determine whether spermatozoa were in or on the person of the victim, and, if such tests were made, the results of the tests, and the results of any other medical reports concerning the condition of the victim, constituted a denial of due process and necessitated a new trial. The court noted that the defendant correctly pointed out that the absence of spermatozoa in or on the person, or on any of the articles of the child's clothing, might be strong circumstantial evidence on his behalf. Without examining the results of any spermatozoa or blood tests, the court continued, the defendant could not know whether such evidence was favorable or unfavorable to him. The court added that the state's contention that only blood and spermatozoa tests had been requested and that there was nothing in the record to establish that any results were ever obtained or that such results were in existence and capable of being discovered was not a satisfactory answer.

In *State v. Gammill*, 585 P.2d 1074 (Cal. 1978), the court held that the prosecution's failure to communicate to defense counsel at or before trial certain medical test results indicating the absence of sperm in the rape victim was error. The court said that regardless of whether this

evidence was withheld deliberately or through inadvertence, the information was imputed to the prosecution, and the fact that it was not communicated to the defendant, regardless of intent, was improper. The state argued that the evidence was not exculpatory. The court responded that exculpatory evidence need not be evidence so strong that it would absolutely exonerate the defendant, but only strong enough to be of assistance in the defense. The state reasoned further that the evidence was not of sufficient materiality to affect the ultimate question of guilt or innocence, but the court concluded that this error was one of several that substantially prejudiced defendant and denied him a fair trial.

C. The Respondents intentionally violated Petitioner's clearly established right to the release of material, exculpatory evidence under *Brady*.

The Petitioner filed a discovery motion that tracked the language of Missouri Supreme Court Rule 25.03 which specifies what a defendant may obtain without the necessity of a court order. The motion requested was the "reports or statements of experts made in connection with this case, including the results of any type of physical, mental or scientific testing conducted regarding this case or the defendant and all underlying notes of such experts." (A-23)

Knowing that this is the standard discovery request in Missouri criminal cases, the Missouri Highway Patrol Crime Lab adopted a policy of sending only typewritten forensic laboratory reports containing "conclusions drawn from laboratory results" to prosecutors. Any other documents containing handwritten test results or statements

of criminalists may be produced only upon a specific request for them. In this case, the typewritten report read "semen not detected" when in fact, semen was present.

The policy adopted by the Missouri Highway Patrol is designed to circumvent *Brady* disclosure requirements and chill discovery. The Highway Patrol Crime Lab deliberately does not give "the results of any type of testing" to the prosecutor so that the prosecutor will not be able to give those items to the defense without asking for more than what is already in his or her file. While both the prosecutor and the defendant may learn the ultimate conclusion drawn by the expert, neither has any idea how that conclusion was arrived at. "Results of tests" and conclusions of the expert may be two very different things.

What is more significant, however, is that the report in this case, as presented to the prosecution and defense, was not just incomplete, it was deceptive. Had the transmission to the prosecutor been complete, the discovery response would have included the results of the acid phosphotase test and the results of the alternate light source test at a minimum. Regardless of whether these tests conclusively showed the presence of semen, the defense should have been made aware that the tests showed that there were biological substances on the items tested which *could* be semen. While the state is not required to run a conclusive test for the presence of semen if it chooses not to, it is required by Missouri Supreme Court Rule 25.03 and *Brady* to accurately and truthfully report the results of the tests it *did* conduct.

This Court has held that nondisclosure of specifically requested information is "seldom, if ever, excusable." *U.S. v. Agurs*, 497 U.S. 97 (1976). The nondisclosure of the

results of tests performed by the crime lab was an intentional act of bad faith. The technician, following the policy approved at the highest level of the Highway Patrol, reported conclusions rather than complying with the plain language of the discovery request. The technician, knowing: (1) that the conclusions he offered could not possibly be instructive to the defense, (2) might be misleading to the defense, and (3) might be construed as an outright lie, reported those conclusions anyway. The effect, as intended, was to interpose a chilling effect on meaningful discovery so that the accused could be convicted. It worked. At the very least, this policy was promulgated and executed by defendants with reckless disregard for the rights of the accused.

Similar claims of violations of 42 U.S.C. §1983 by crime lab technicians outside the Eighth Circuit have been successful in avoiding summary judgment.

In *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004), the defendant was accused of falsifying and omitting from disclosure certain test results obtained in the Oklahoma State Crime Laboratory. Based on both the falsified results and omitted results, the Tenth Circuit found that *Brady* was violated and Ms. Gilchrist did not enjoy the protection of qualified immunity.

In *Gregory v. City of Louisville*, 2004 U.S. Dist. Lexis 7046 (W.D.Ky. 2004), an employee of the Kentucky State Police Crime Laboratory failed to disclose to the prosecutor that there were two hairs found in a pair of pantyhose allegedly worn by a rapist that did not match the defendant's hair. In denying the defense motion for summary judgment based upon materiality of the non-disclosure and qualified immunity, the court had no trouble determining that there was a "clearly established right" to receive accurate information from crime lab reports, but held that

materiality of the suppressed information was a question for the jury.

In short, the Eighth Circuit's opinion in this matter has created an embarrassing disparity of treatment of similar claims under 42 U.S.C. §1983. Only this Court can restore harmony to the decisions in this area.

CONCLUSION

For the foregoing reasons, petitioner Armand Villasana respectfully requests that this Court grant the writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit, or in the alternative, grant the writ, vacate the judgment below, and remand the case for further consideration.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
FOR THE EIGHTH CIRCUIT.

No. 03-2266.

Armand Villasana, Jr.,	*	
Plaintiff-Appellant,	*	Appeal from the United
	*	States District Court for
v.	*	the Western District of
Weldon Wilhoit, et al.,	*	Missouri.
Defendants-Appellees.	*	

Submitted: January 14, 2004.
Filed: June 1, 2004.

Before LOKEN, Chief Judge, FAGG and BOWMAN, Circuit Judges.

LOKEN, Chief Judge.

After Armand Villasana was tried and convicted of kidnaping, rape, and sodomy in a Missouri state court, he moved for a new trial. In responding to that motion, the prosecutor produced test results underlying previously produced Missouri State Highway Patrol Crime Laboratory reports. Based on these test results, Villasana hired an expert who performed additional DNA testing on the physical evidence in question. After the expert explained these test results at a hearing on the motion for new trial,

the prosecutor urged the court to grant the motion and vacate Villasana's conviction, advising that the State would then dismiss the charges because it could no longer prove him guilty beyond a reasonable doubt. The court did so, and Villasana was released that day. He then filed this § 1983 damage action against six Crime Laboratory officials, alleging that they violated his constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing documents underlying the lab reports prior to trial. The district court[1] granted summary judgment in favor of the defendants, concluding they are entitled to qualified immunity. Villasana appeals. We affirm.

After reporting the kidnaping and sexual abuse, the victim submitted to a rape kit examination, and a physician collected the victim's clothing and hospital bed sheet. This physical evidence was sent to the Crime Laboratory where serologist Joseph Roberts examined the sexual assault kit and the victim's clothing for the presence of semen. Roberts found none. It is Crime Laboratory policy to send official lab reports to the prosecuting attorney but to send additional information, such as underlying test results, only if requested to do so. Consistent with this policy, Roberts prepared and signed lab reports stating that "[s]emen was not detected" on this evidence. The Crime Laboratory sent those reports to the prosecutor.

Two months later, Villasana's trial counsel served a discovery request that included a demand for "results of any type of physical, mental or scientific testing conducted regarding this case . . . and all underlying notes of such

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[1] The HONORABLE SCOTT O. WRIGHT, United States District Judge for the Western District of Missouri.

experts." In response, the prosecutor produced the Crime Laboratory reports as part of her open file policy. She did not contact the Crime Laboratory to request its underlying test data, and defense counsel did not follow up with a request for any notes underlying the lab reports, even after Roberts referred to his notes in a pretrial deposition. Both the prosecutor and defense counsel were unfamiliar with the Crime Laboratory's policies and procedures.

The underlying documents produced after trial included Roberts's handwritten notes regarding the tests he had performed. The documents revealed (1) that vaginal swabs from the victim sexual assault kit tested positive for acid phosphatase, an enzyme found in seminal and other bodily fluids, but semen was not detected using the more precise "P30" test; and (2) that stains on the victim's sweatpants and hospital bed sheet had fluoresced, indicating the presence of biological material, but further testing did not detect the presence of semen. Based on these clues, Villasana's post-trial expert conducted DNA testing of a vaginal swab and stains on the victim's sweatpants and the hospital bed sheet. She was able to develop DNA profiles of an unknown male that were consistent with each other but inconsistent with the victim's husband and Villasana. After consulting with Roberts, the prosecutor advised the court that the State could not refute this evidence and that Villasana should be released.

Villasana then commenced this damage action. The second amended complaint alleged that Roberts and five Crime Laboratory supervisors violated Villasana's due process rights under *Brady* by failing to disclose or cause to be disclosed the underlying test documents and by failing to adopt policies and to train Roberts and other

personnel to ensure "production of exculpatory or potentially exculpatory evidence." After substantial discovery, the district court granted defendants' motion for summary judgment, concluding they are entitled to qualified immunity from these claims. The court reasoned that no case has extended liability under *Brady* to crime laboratory technicians and therefore Villasana failed to show "that defendants had a clearly established obligation under *Brady* to disclose exculpatory or potentially exculpatory evidence to the prosecution or to the plaintiff." Reviewing de novo the question whether the asserted federal right was clearly established, we agree. *See Elder v. Holloway,* 510 U.S. 510, 516 (1994) (standard of review); *Saucier v. Katz,* 533 U.S. 194, 201 (2001) (whether a right is clearly established "must be undertaken in light of the specific context of the case"); *Mowbray v. Cameron County,* 274 F.3d 269, 278 (5th Cir. 2001) (no case has extended *Brady* liability to laboratory technicians), *cert. denied,* 535 U.S. 1055 (2002). We further conclude that Villasana's damage claims are fatally flawed for the following additional reasons.

1. No *Brady* Violation Occurred. In *Brady,* the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Materially favorable evidence includes both exculpatory and impeachment evidence. *See United States v. Bagley,* 473 U.S. 667, 676 (1985). To comply with *Brady,* a prosecutor must "learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles v. Whitley,* 514 U.S. 419, 437 (1995).

In this case, the prosecutor did not violate *Brady* prior to Villasana's conviction for two reasons. First, when serologist Roberts referred repeatedly to his lab notes in his pretrial deposition, the existence of the allegedly suppressed evidence became known to the defense. *Brady* requires no more. *See Odem v. Hopkins,* 192 F.3d 772, 777 (8th Cir. 1999); *Nassar v. Sissel,* 792 F.2d 119, 121-22 (8th Cir. 1986). Roberts's disclosure made the situation unlike that in *Strickler v. Greene,* 527 U.S. 263, 285 (1999), where the Court found cause excusing a state habeas petitioner's procedural default of a *Brady* claim because it was "especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld."

Second, although the duty imposed by *Brady* extends to evidence in the State's possession not known to the prosecutor, it applies only to "favorable evidence rising to a material level of importance." *Kyles,* 514 U.S. at 438; *see United States v. Agurs,* 427 U.S. 97, 108-10 (1976). Therefore, the prosecutor's absolute duty to disclose under *Brady* is limited to evidence a reasonable prosecutor would perceive at the time as being material and favorable to the defense. Here, the Crime Laboratory tested the physical evidence, did not detect the presence of semen, and reported that non-exculpatory fact to the prosecutor, who produced the lab reports for the defense. Underlying test documents consistent with the non-exculpatory reports were retained but not produced. These documents contained clues that led Villasana's post-conviction expert to conduct DNA testing the State elected not to perform. On their face, however, the documents had neither exculpatory nor impeachment value, and "the police do not have a constitutional duty to perform any particular tests." *Arizona v. Youngblood,* 488 U.S. 51, 59 (1988). Thus, the

documents fell outside the scope of *Brady's* absolute duty to disclose. "To hold otherwise would impose an insuperable burden on the Government to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning." *United States v. Comosona,* 848 F.2d 1110, 1115 (10th Cir. 1988); *accord United States v. Poindexter,* 727 F. Supp. 1470, 1485 (D.D.C. 1989).

2. *Brady's* Absolute Duty Is Limited to the Prosecutor. The *Brady* doctrine imposes an absolute duty on the prosecutor to produce all materially favorable evidence in the State's possession. This procedural due process doctrine reflects "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281. The Supreme Court has never imposed this absolute duty on law enforcement officials other than the prosecutor.

It is logical to impose *Brady's* absolute duty on the government official who will present the State's case at trial, who can be expected to gather material evidence from law enforcement agencies, and who is in the best position to evaluate whether evidence must be disclosed because it is materially favorable to the defense. When acting in those capacities, the prosecutor has absolute immunity from *Brady* damage claims under § 1983. *Imbler v. Pachtman,* 424 U.S. 409, 431 n. 34 (1976); *see Buckley v. Fitzsimmons,* 509 U.S. 259, 273 (1993) (immunity includes the prosecutor's "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial"); *Jean v. Collins,* 221 F.3d 656, 661 (4th Cir. 2000) (en banc) (Wilkinson, C.J., concurring), *cert. denied*, 531 U.S. 1076 (2001); *Moore v. Valder*, 65 F.3d 189, 194 (D.C.Cir. 1995), *cert. denied,* 519 U.S. 820 (1996).

Villasana would extend *Brady's* absolute liability to any law enforcement officer who was part of the prosecutor's "team," including in this case scientists employed by the Highway Patrol Crime Laboratory. This extension is not needed to secure post-conviction relief for one whose conviction was tainted by a *Brady* violation, because the prosecutor's duty is absolute. The extension is simply a device to avoid the impact of the prosecutor's absolute immunity from § 1983 damage liability. We conclude the extension is unsound. In *Imbler,* the Court explained that one reason for applying the prosecutor's absolute common law immunity to § 1983 damage actions is that the focus of post-conviction procedures – whether the accused received a fair trial – "should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." 424 U.S. at 427. That reasoning applies equally to post-conviction *Brady* inquiries into whether evidence unknown to the prosecutor should have been disclosed by another government official.

Under *Brady,* the prosecutor is responsible for failing to produce materially favorable evidence regardless of fault, that is, intentional suppression or bad faith. The Supreme Court has also considered whether other law enforcement officers, including laboratory technicians, should be liable for destroying evidence that *might* have produced test results favorable to the defense. The Court concluded that "failure to preserve potentially useful evidence does not constitute a denial of due process" in the absence of bad faith. *Youngblood,* 488 U.S. at 58; *see California v. Trombetta,* 467 U.S. 479, 488 (1984). We conclude this bad faith standard should likewise apply to

due process claims that law enforcement officers preserved evidence favorable to the defense but failed to disclose it. In other words, *Brady* ensures that the defendant will obtain relief from a conviction tainted by the State's nondisclosure of materially favorable evidence, regardless of fault, but the recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial. We note that the few decisions in other circuits purporting to extend "*Brady* liability" to police officers have involved claims of intentional or bad faith failure to disclose *Brady* material to the prosecutor or to the defense. *See Newsome v. McCabe,* 256 F.3d 747, 752 (7th Cir. 2001); *McMillian v. Johnson,* 88 F.3d 1554, 1569 (11th Cir. 1996), *cert. denied,* 521 U.S. 1121 (1997).

In this case, although Villasana argues that Roberts's pretrial deposition testimony misled defense counsel into not looking behind the non-exculpatory lab reports, there is no evidence the defendants acted in bad faith, that is, engaged in "a conscious effort to suppress exculpatory evidence." *Trombetta,* 467 U.S. at 488. The underlying test documents contained notes by serologist Roberts that were consistent with the disclosed lab reports. Roberts referred to his notes repeatedly during his pretrial deposition. Sending only the lab reports to the prosecutor was consistent with Crime Laboratory policy. Acting in accordance with agency policy tends to show good faith rather than bad, whether or not the policy is sound. *See United States v. Gray,* 126 F.3d 1109, 1110 (8th Cir. 1997). In these circumstances, even if the undisclosed documents were materially favorable to the defense under *Brady,* Villasana failed to establish the bad faith required under *Youngblood*

to recover § 1983 damages from the Crime Laboratory officials.

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

ARMAND VILLASANA, JR.	) **Case No.**
Plaintiff,	) **01-4113-CV-SOW**
	)
vs.	)
COL. WELDON L. WILHOIT, et al.,	)
	)
Defendants	)

ORDER

Before the Court are plaintiff's Motion for Partial Summary Judgment (Doc. #64), defendants' Motion for Summary Judgment (Doc. #70), and defendants' Motion to Strike (Doc. #82). For the reasons stated below, the Court denies defendants' Motion to Strike, grants defendants' Motion for Summary Judgment, and denies plaintiff's Motion for Summary Judgment.

I. Background

Plaintiff Armand Villasana is suing certain officials within the Missouri Highway Patrol ("MHP"), specifically its Crime Lab, alleging that they failed to disclose or failed to insure disclosure of certain test result documents that could have permitted plaintiff to take advantage of exculpatory or potentially exculpatory evidence. Plaintiff sets forth the following claims: (1) failure to disclose exculpatory evidence as required by the United States Constitution and as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963); and (2) failure to properly train, supervise, and set

forth appropriate procedures to ensure compliance with *Brady* in violation of 42 U.S.C. § 1983.

The claims in this case arise from plaintiff's state court convictions for kidnapping, forcible rape, and forcible sodomy on November 10, 1999. Following his convictions, plaintiff hired new counsel to pursue an appeal on his behalf. During the post-conviction investigation, plaintiff's counsel discovered test results that led to further testing, which resulted in unassailable DNA proof of plaintiff's innocence. The state then dismissed all charges against plaintiff and released him from jail on June 21, 2000.

In the present action, plaintiff is suing the following defendants: Colonel Weldon Wilhoit, Superintendent of the MHP; Major Michael Pace, Supervisor of the MHP's Criminal Investigation Bureau; Captain Terry Luikart, Division Director of the MHP Crime Lab; Lieutenant John Ford, Assistant Division Director of the MHP Crime Lab; Cary Maloney, Supervisor at the Crime Lab; Thomas Grant, Quality Assurance Coordinator/Criminalist Supervisor at the Crime Lab; and Joseph Roberts, Investigator at the Crime Lab.

Both parties have filed motions for summary judgment on plaintiff's claims. Defendants have also filed a motion to strike plaintiff's Reply Suggestions in Support of the Motion for Partial Summary Judgment (Doc. #81) on the grounds that plaintiff improperly included additional affidavits, citations, and exhibits in violation of Federal Rule of Civil Procedure 56 and Local Rule 7.1. Plaintiff responds that "[c]itation of case law and evidence to rebut arguments advanced by . . . [d]efendants is proper." The Court agrees with plaintiff that his Reply is not improper. Therefore, defendants' motion to strike is denied.

The following uncontroverted facts are relevant to the pending motions for summary judgment. On September 16, 1998, a Greene County, Missouri woman was allegedly kidnapped, raped, and sodomized by an unknown male. The victim was examined at a hospital following the attack, and items of physical evidence were collected during the examination. On September 25, 1998, plaintiff was arrested on unrelated charges. The next day, after a voice identification by the victim, plaintiff was charged with her rape, kidnapping, and sodomy. Plaintiff remained in the Greene County jail pending his trial because he could not make bail, which was set at $550,000.

Jill Geary ("Geary") was the lead prosecutor in the case against plaintiff. On October 5, 1998, public defender Gary Wilson entered his appearance on behalf of plaintiff. On October 6, 1998, the Crime Lab received several items of physical evidence collected from the victim as well as a blood sample from plaintiff. Defendant Roberts, who was one of the criminologists who tested and analyzed evidence in connection with the case filed against plaintiff, forwarded copies of five typewritten reports, each entitled "Forensic Laboratory Report" to Geary prior to plaintiff's trial. On January 2, 1999, Wilson filed a discovery request pursuant to Supreme Court Rule 25.03 of the Missouri Rules of Criminal Procedure, wherein he requested, among other things, "all underlying notes of such experts" and "[a]ny material or information within the possession or control of the State . . . which tends to negate the guilt of the Defendant as charged."

Geary's office has an "open file" policy, which means after a preliminary hearing, defense counsel is entitled to everything in the prosecutor's file. Geary never objected to Wilson's discovery request, and Wilson relied upon the

"open file" policy in plaintiff's case. It is the policy of the Crime Lab to automatically forward to the prosecutor copies of typewritten forensic laboratory reports containing conclusions drawn from laboratory results. Additional information, such as handwritten notes, is provided upon written or verbal request. Wilson deposed Roberts on September 30, 1999, during which Roberts referred to his "notes" at least three times.

Plaintiff's criminal trial began on November 8, 1999, and he was convicted of kidnapping, forcible rape, and forcible sodomy on November 10, 1999. After his conviction, plaintiff hired new private defense counsel, Shawn Askinosie, to pursue an appeal. After a hearing, Geary received a fax from Roberts in response to a request she made. The fax included a Blood and Semen Detection sheet, which included Roberts' handwritten notes and which Geary had not previously seen. Geary stated in her deposition that she relies on the Crime Lab to provide her with copies of documents that relate to the work done in a particular case.

In April of 2000, all documents relating to the tests performed by Roberts were produced pursuant to a court order, including a document entitled Victim Sexual Assault Kit. The Victim Sexual Assault Kit and the Blood and Semen Detection sheet, both of which Geary and Wilson had not previously seen, revealed that the vaginal swabs tested by Roberts were positive for Acid Phosphatase ("AP"), an enzyme that can be found in seminal fluid, and that stains on the victim's sweatpants and hospital sheet fluoresced under the Alternate Light Source ("ALS") test, indicating the possible presence of biological material.

Based upon this new information, plaintiff's counsel hired DNA expert Jami Harman ("Harman") to perform testing on the evidence Roberts tested on behalf of the State. Harman's testing revealed that the genetic profile obtained from the victim's sweatpants contained a DNA mixture from at least two individuals. The victim was one contributor and the other contributor was neither the victim's husband nor plaintiff. In addition, the male genetic profile obtained from the hospital bed sheet was inconsistent with the victim's husband and plaintiff. Finally, the vaginal swab from the victim contained a male profile that was consistent with the unknown male profile from the sweatpants and the hospital bed sheet.

On June 21, 2000, a hearing was held on plaintiff's motion for a new trial. After hearing the direct testimony of Harman, the State consented to the court vacating plaintiff's conviction and the granting of a new trial. The State then dismissed the charges against plaintiff, stating that it could not prove its case against plaintiff beyond a reasonable doubt in light of the DNA evidence presented at the hearing. Plaintiff was released from the Greene County Jail on June 21, 2000. He had been incarcerated since September 25, 1998.

II. Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[W]hen a properly supported motion for summary judgment is made, the adverse party 'must

set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)) (footnote omitted). In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Reed v. ULS Corp.*, 178 F.3d 988, 990 (8th Cir. 1999).

III. Discussion

Plaintiff's first claim is that defendants failed to disclose or failed to insure disclosure of exculpatory evidence as required by the United States Constitution and as set forth in *Brady v. Maryland*, 373 U.S. 83, 87 (1963). He claims that his Fifth, Sixth, Eighth and Fourteenth Amendment rights, as protected by 42 U.S.C. § 1983, were violated. Plaintiff's second claim is that defendants failed to properly train, supervise, and set forth appropriate procedures to ensure compliance with *Brady* in violation of 42 U.S.C. § 1983.

The Supreme Court, in *Brady v. Maryland*, held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Since *Brady*, the Supreme Court has further clarified the three elements of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that the evidence must have been suppressed by the prosecution,

either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

In addition to defendants' arguments that plaintiff cannot establish the elements of a *Brady* violation, defendants primarily argue that they are entitled to qualified immunity on both of plaintiff's claims. The Court will address the immunity question first.

The Supreme Court has described qualified immunity in this way: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In deciding this issue, courts should not only look at the current law, "'but whether that law was clearly established at the time an action occurred.'" *Siegert v. Gilley,* 500 U.S. 226, 231 (1991) (quoting *Harlow,* 457 U.S. at 818).

In this case, plaintiff claims that defendants clearly violated his constitutional rights by failing to disclose or failing to insure disclosure of exculpatory evidence in the form of notes taken by Roberts. Essentially, plaintiff is arguing that crime lab personnel are constitutionally obligated under *Brady* to automatically produce exculpatory documents to the prosecution. Defendants challenge this contention, arguing that such a constitutional obligation on crime lab technicians was not then and is not now clearly established.

Defendants argue that there are no cases that hold lab technicians liable for *Brady* violations, citing two cases that address the issue. In *Mowbray v. Cameron County*,

274 F.3d 269, 278 (5th Cir. 2001), where the plaintiff sued a crime laboratory technician pursuant to Section 1983 for not producing exculpatory evidence, the Fifth Circuit stated: "[plaintiff] cites, and our research reveals, no case extending *Brady* to . . . lab technicians." Moreover, in *In re Brown*, the Supreme Court of California held that the prosecution is solely responsible for *Brady* violations even where the crime lab failed to apprise the prosecution of the potentially exculpatory evidence. 952 P.2d 715, 718-21 (Cal. 1998).

In response, plaintiff directs the Court to an Eleventh Circuit case entitled *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996). Plaintiff cites this case for the proposition that "police officers who fail to provide exculpatory or impeachment evidence to a prosecutor may be held liable under 42 U.S.C. § 1983." The Court assumes that plaintiff is urging the Court to extend liability under *Brady* from police officers to all law enforcement personnel, including crime lab technicians. *McMillian* does not support this suggestion, however, because it only involved police officers. The case did not involve "all law enforcement personnel" or crime lab technicians, and it did not address their potential liability under Section 1983 for alleged *Brady* violations.

Plaintiff also cites *Wilson v. Lawrence County, Missouri,* 260 F.3d 946, 957 (8th Cir. 2001), for the proposition that "the Eighth Circuit has also recently held that law enforcement officers have a responsibility to criminal defendants in disclosing exculpatory evidence to the defense." *Wilson* also has no bearing on the facts of this case, however, because it did not involve the nondisclosure of purportedly exculpatory evidence by lab technicians. Rather,

the portion of the case cited by plaintiff deals with the failure of investigating police officers to pursue other leads.

The Court concludes that defendants are entitled to qualified immunity on both of plaintiff's claims because defendants' conduct did not violate a clearly established constitutional right. Plaintiff has not met his burden of showing that defendants had a clearly established obligation under *Brady* to disclose exculpatory or potentially exculpatory evidence to the prosecution or to the plaintiff. Therefore, plaintiff's claims against defendants are dismissed based upon qualified immunity.

IV. Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's Motion for Partial Summary Judgment (Doc. #64) is denied. It is further

ORDERED that defendants' Motion for Summary Judgment (Doc. #70) is granted, and plaintiff's claims are dismissed with prejudice. It is further

ORDERED that defendants' Motion to Strike (Doc. #82) is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States
District Judge

Dated: 4-18-03

APPENDIX C

25.03. Misdemeanors or Felonies – Disclosure by State to Defendant Without Court Order

(A) Except as otherwise provided in these Rules as to protective orders, the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in said request:

(1) The names and last known addresses of persons whom the state intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements;

(2) Any written or recorded statements and the substance of any oral statements made by the defendant or by a co-defendant, a list of all witnesses to the making, and a list of all witnesses to the acknowledgment, of such statements, and the last known addresses of such witnesses;

(3) Those portions of any existing transcript of grand jury proceedings which relate to the offense with which defendant is charged, containing testimony of the defendant and testimony of persons whom the state intends to call as witnesses at a hearing or trial;

(4) Any existing transcript of the preliminary hearing and of any prior trial held in the defendant's case if the state has such in its possession or if such is available to the state;

(5) Any reports or statements of experts, made in connection with the particular case, including results of

physical or mental examinations and of scientific tests, experiments, or comparisons;

(6) Any books, papers, documents, photographs, or objects, which the state intends to introduce into evidence at the hearing or trial or which were obtained from or belong to the defendant;

(7) Any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial;

(8) If there has been any photographic or electronic surveillance (including wiretapping), relating to the offense with which the defendant is charged, of the defendant or of conversations to which the defendant was a party or of his premises; this disclosure shall be in the form of a written statement by counsel for the state briefly setting forth the facts pertaining to the time, place, and persons making the same;

(9) Any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment.

(B) The request provided for by this Rule shall be made by serving a copy of the request upon counsel for the state and each defendant to be tried jointly with the defendant. The original of such request shall be filed in the court having jurisdiction to try the case.

(C) If the defense in its request designates material or information which would be discoverable under this Rule if in the possession or control of the state, but which is, in fact, in the possession or control of other governmental personnel, the state shall use diligence and make good

faith efforts to cause such materials to be made available to the defense counsel, and if the state's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court, upon request, shall issue suitable subpoenas or orders to cause such material or information to be made available to the state for disclosure to the defense.

[Affidavit Exhibit A]

IN THE CIRCUIT COURT OF GREENE COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, Plaintiff,	) Case No. 398CF7227) Division No. 2
v.	)
ARMAND P. VILLASANA, Defendant.	)

REQUEST FOR DISCOVERY

(Filed Jan. 21, 1989)

Defendant requests the following within ten days and throughout the duration of this cause, pursuant to Rule 25.03:

1. The names and the last known addresses of persons whom the State intends to call as witnesses at any hearing or trial, together with their written or recorded statements and existing memoranda reporting or summarizing part or all of their oral statements;

2. Any written or recorded statements and the substance of any oral statements made by the defendant or by a codefendant, a list of witnesses to the making, and a list of witnesses to the acknowledgment, of such statements, and the last known addresses of such witnesses;

3. Those portions of any existing transcript of grand jury proceedings which relate to the offense with which defendant is charged, containing testimony of defendant, codefendants or persons whom the State intends to call as witnesses at any hearing or trial;

4. Any existing transcript of the preliminary hearing or any prior trial in defendant's case if such is in the possession of the State or available to the State;

5. Any reports of statements of experts made in connection with this case, including results of any type of physical, mental or scientific testing conducted regarding this case or the defendant and all underlying notes of such experts;

6. Any books, papers, documents, photographs or objects which the State intends to introduce into evidence at any time or which were obtained from or belong to the defendant;

7. Any record of any prior criminal convictions of persons the State intends to call as witnesses at any hearing or the trial;

Robert's Deposition
Exhibit CC-2

[LOGO] MISSOURI STATE HIGHWAY PATROL [LOGO]
CRIME LABORATORY DIVISION
An ASCLD Accredited Laboratory
Forensic Laboratory Report

Lab Number: L-151922
Date Rec'd: 10-06-1998
Time Rec'd: 0800

Received From: Sheriff's Office
Telephone #: 417-868-4040
Location: Greene County, MO
Date of Crime: 09-16-1998
Type of Crime: Sexual Assault
Delivered by: Locked D Lab Locker (Supv. Carol Carter) csc
Agency Report #: 04838-98
Agency Related Report #: _____
Container(s): One (s) box
Type of Examination(s): (Serology – Trace)
* * * * * (Names and possible association to case) * * * * *
Lummis, Judith A. VIC
Villasana, Armand P., Jr.
* * * * * * * * * (Description of Evidence) * * * * * * * * *

1. One sealed box containing:

   A. One sealed MSHP sexual assault kit labeled "Lummis, Judith".

   B. One sealed plastic bag containing one blood tube labeled "Villasana, Armand".

   C. One sealed plastic bag containing one syringe caps.

SEROLOGY EXAMINATIONS BY JOSEPH A. ROBERTS

Semen was not detected on the vaginal samples or specimen jar from the kit (1A).

A dried blood card was prepared from the whole blood standard of Armand Villasana (1B) and will be retained at the laboratory for possible future analysis.

Serological examinations were not conducted on Specimen 1C at this time.

TRACE EXAMINATIONS BY NICHOLAS W. GERHARDT

No foreign hairs were found in the victim's pubic hair combings of Specimen 1A.

Robert's Deposition
Exhibit CC-3

[LOGO] MISSOURI STATE HIGHWAY PATROL [LOGO]
CRIME LABORATORY DIVISION
An ASCLD Accredited Laboratory
Forensic Laboratory Report

Laboratory Number: L-151922

SUBMITTING AGENCY: Greene County Sheriff's Office
TYPE OF CRIME: Sexual Assault
DATE OF CRIME: September 17, 1998
LOCATION OF CRIME: Greene County, MO
AGENCY REPORT #: 4838-98
ASSOCIATED NAME(s): Judith A. Lummis (victim)
Armand Phillip Villesana, Jr.

SECOND REPORT OF THIS CASE

SEROLOGY EXAMINATIONS BY JOSEPH A. ROBERTS

Semen was not detected on any of the clothing submitted (2A-2E).

TRACE EXAMINATIONS BY NICHOLAS W. GERHARDT

Several hairs were found on the victim's clothing of specimen 2. If the sexual assault kit (specimen 1) is resubmitted, hair comparisons will be conducted.

"The undersigned, do hereby certify that the above and foregoing is a true and accurate copy of the results of lab tests conducted."

"Signed this 24th day of May, 1999".

/s/ Joseph A. Roberts
Joseph A. Roberts – Criminalist

/s/ Nicholas W. Gerhardt
Nicholas W. Gerhardt – Criminalist

PLEASE REFER TO THE ABOVE MISSOURI STATE HIGHWAY PATROL CRIMINAL LABORATORY NUMBER FOR ALL CORRESPONDENCE AND SUBPOENA INFORMATION REGARDING THIS CASE.

The specimen(s) submitted should be picked up as soon as possible.

JAR:NWG:sks

Exhibit 4

Facsimile Cover Sheet

MISSOURI STATE HIGHWAY PATROL
CRIME LABORATORY DIVISION
General Headquarters Annex Building
P.O. Box 568 • Jefferson City, MO 65102 •
(573) 526-6134

Facsimile Number (573) 751-9922

DATE: 2-24-00 **TIME:** 7:50 **PAGE** 1 OF 2

FROM: Joe Roberts
TELEPHONE NUMBER: (573) 526-6134

TO: Jill Geary

FACSIMILE NUMBER: 417-868-4160

REFERENCE NUMBER:

COMMENTS: under the column heading "semen" are 3 listings. The abbreviation "LS" refers to the use of the Alternate Light Source. An indication of "-✓" means that no stain fluoresced, an indication of "+✓" means some stains fluoresced and further chemical tests were needed.

The follow-up screening test is indicated under the column heading "AP". The result is listed as to how many times the item was tested (i.e. how many separate stains) and the overall result. (11x- would indicate that eleven stains were negative for the presence of semen).

If ya have any further questions, don't hesitate to call.

/s/ Joe Roberts

CONFIDENTIALITY NOTICE:

THE DOCUMENTS ACCOMPANYING THIS TELECOPY TRANSMISSION MAY CONTAIN CONFIDENTIAL INFORMATION BELONGING TO THE SENDER WHICH IS LEGALLY PRIVILEGED. THE INFORMATION IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY RECIPIENT NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISCLOSURE, COPYING, DISTRIBUTION, OR THE TAKING OF ANY ACTION IN RELIANCE ON THE CONTENTS OF THIS TELECOPIED INFORMATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS TELECOPY IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE TO ARRANGE FOR RETURN OF THE ORIGINAL DOCUMENTS TO US.

HOSTILE DEPOSITION EXHIBIT CC-7 3-11-02

1 one (1) box VICTIM SEXUAL ASSAULT KIT
161 "036" Cont:

1A 1 (s) MSHP Victim S.A. kit labeled: "Lummus, Judith"

1A1 1 W.E. Pubic Hair Combings

1A2 1 W.E. Pubic Hair Control

1A3 1 Mailer 2 Vaginal Smears

1A4 1 W.E. 2 Vaginal Swabs

1A5 1 W.E. 1 Blood Tube labeled: "Lummus, Judith"

1A6 1 W.E. Blood Stain

1A7 1 W.E. Head Hair Control

1A8 1 M.E. Physician's Report

~~1 P.B. Victim's Underwear~~ 1A9

1A9 one plastic bag containing specimen jar w/ pink fluid (contents unknown).

L- 117922

Date: 10-20-98

Serologist: JAR

Case: SA

Agency: Grand Co SO

Victim(s) Lummus, Judith A.

Suspect(s) Williams, Armond P, Jr.

A-30

#	SAMPLE	SPERM	LS	AP pc ☑	P30	RFLP	PCR	COMMENTS
								required 10-27-98 to test w/ suspect
1A3	2 Vaginal Smears	- -						
1A4	Vaginal Swabs			2 1st 4th 1 3rd	AGA ☑ J1 -	✓		X 1st swab left. 1/2
1A5	Blood Standard	Blood		Card	MAD			
1A6	Blood Stain					✓		
1A9	Specimen Jar				AGA ☒ J3 -			Not tested @ this time tested 10-27-98
1B	one (1) plastic bag 1B "Williams, Armond" contains the blood tube			Blood Card	☐ AGA DQ			1B blood tube 1B "Williams, Armond"
1C	one (1) plastic bag 1C "Williams, Armond" contains Sodium Hydroxide, Stained Sponge Cups				☐			not tested.
					☐			

revised 3/98

BEST AVAILABLE COPY

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TETLER
DEPOSITION EXHIBIT
CC-8

BLOOD AND SEMEN DETECTION

L- 15/922 (A1)
Date: 5-5-19
Serologist: JAE

Victim(s): Lumis, Judith A.
Suspect(s): Villasana, Armando Phillip Jr.

Case: SA
Agency: Greene Co SO

LOCATION	SPECIMEN(S) #	DESCRIPTION	BLOOD LMG ☐	TAK	PTN	SEMEN AP ☐	P_{30}	LS	DNA RFLP	PCR	COMMENTS
(B)	2	one (1) bpb ISI "clothing of Judith Lumis" cont:		☐	☐		☐				
	2A	one (1) bpb ISI "dark white sweatpants" cont: one pair of off-white sweatpants		☐	☐	11+	☐	+			
	2B	one (1) bpb ISI "flannel shirt dark" cont: one grey, black region within flannel shirt. "Private Property" XL		☐	☐		☐	—			long hair. Wrapped in brown paper + and.
	2C	(1) with regarding Bamberger paper cont: one (1) bpb (blue holographic from envelope) ISI "dark grey sweatshirt" cont: one grey sweatshirt "Cyber-onesie" Sleeveless. Moldy		☐	☐		☐	—			
	2D	one (1) bpb ISI "sheet .. pt. of isolation" cont: one flat white hospital sheet.		☐	☐	9+	☐	+			
	2E	one (1) bpb ISI "dark socks" cont: Two socks (musty smelling)		☐	☐		☐	—			

A-31

On 09-30-98, I contacted [Illegible] Enterprises in Huggins, Mo. and spoke [illegible] Mr. Dailing. Mr. Dailing is the owner of a roofing crew and he advised [illegible] his roofing crew roofed the Walmart Supercenter in Nixa, Mo. and is recently roofing the Walmart Supercenter in Salem, Mo. Mr. Dailing advised [illegible] he has an employee named Kevin Nims. Mr. Dailing advised that I was [illegible] to come to Salem, Mo. and speak to Nims if I so desired.

On 09-30-98, I took a copy of the search warrant return to the office [illegible] Judge Wesbrooke and filed a copy of that return with the court. A copy [illegible] that search warrant return is included in this investigative report.

On 09-30-98, I took the rape kit of Judith Lummis and the blood of [illegible] Armand Villasana, to the Missouri State Highway Patrol Lab for analysis.

On 10-01-98, Detective Kamykowski and I went to Salem, Mo. and interviewed Mr. Kevin E. Nims, dob: 06-15-65, of 10997 Stone Ridge Road, [Illegible], Mo. 65484 Phone: 417-458-4852 Mr. Nims admitted that he knew who Armand Villasana was, but he totally denied that Armand gave him a Budweiser [illegible] or knife. Nims gave us consent to search his motel room and we did search the personnel [sic] property of Nims. No Budweiser shirt was located.

On 10-01-98, Detective Kamykowski and I interviewed Brian L. Sutton, [illegible] 04-21-80, of 5324 Highway 137, Yukon, Mo. 65589. Sutton also works for [Illegible] Enterprises and advised that he knew both Villasana and Estes. [Illegible] denied that Villasana

offered him a Budweiser shirt. Sutton stated [illegible] he did do some drinking with both subjects.

On 10-29-98, I contacted the Missouri State Highway Patrol Lab in Jefferson City, Mo. to find out the status of the tests being conducted on the evidence I submitted. I spoke to a Criminalist, who advised that the lab had received the rape kit of Judith Lummis and the blood sample of Villasana. The criminalist advised that no semen was detected on the slides from the rape kit of Lummis. The examiner advised that fluids were found, but no semen. Therefore, unless a hair is found, no DNA tests could be performed. [Emphasis added.]

Detective Kamykowski of the Springfield Police Department also conducted [illegible] up investigation into this case. A copy of his report and activities [illegible] be added to this case upon its receipt.

Investigation completed at this time.

/s/ Mark A. Hall
Detective Mark A. Hall
Green Co. Sheriff's
Department